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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nature's Rest, Inc.

Serial No. 76447249

Brian M. Mattson of Patents+TMS for applicant.

Stacy B. Wahlberg, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Managing Attorney).

Before Quinn, Hohein and Bucher, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Nature's Rest, Inc. to
register the mark BIOSTATIC for "mattress covers."¹

The Trademark Examining Attorney refused registration
under Section 2(e)(1) of the Trademark Act on the ground
that applicant's mark, if applied to applicant's goods,
would be merely descriptive of them. When the refusal was
made final, applicant appealed. Applicant and the

¹ Application Serial No. 76447249, filed September 6, 2002,
alleging a bona fide intention to use the mark in commerce.

examining attorney submitted briefs. An oral hearing was not requested.

The examining attorney maintains that the mark merely describes a feature or characteristic of applicant's mattress covers, namely, that they have antimicrobial properties (i.e., properties which prevent growth of bacteria on the goods). In support of the refusal, the examining attorney submitted pages of websites, including applicant's, retrieved from the Internet, as well as excerpts of articles obtained from the NEXIS database. According to the examining attorney, this evidence shows that the term "biostatic" is commonly used to refer to goods with antimicrobial properties.

Applicant argues that its mark is, at worst, only suggestive and that a multi-stage reasoning process is required in order for the merely descriptive significance of the mark to be readily apparent to consumers. Applicant's mattress covers are made of latex and, according to applicant, while the mark may describe a "result" of the goods, "namely prevention of microbial or bacterial organisms," the mark does not describe a characteristic of the goods. (Brief, p. 3). Applicant further points out that there is no dictionary entry for the term "biostatic," and that, therefore, the term may be

susceptible to a variety of meanings other than the one proposed by the examining attorney. Applicant also dismisses the NEXIS evidence submitted by the examining attorney, contending that the articles concern products different from applicant's mattress covers.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *See In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would

have to the average purchaser of the goods or services because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).² It is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods are services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); see also *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). Similarly, as the Board has explained:

...the question of whether a mark is merely descriptive must be determined not in the abstract, that is, not by asking whether one can guess, from the mark itself, considered in a vacuum, what the goods or services are, but rather in relation to the goods or services for which registration is sought, that is, by asking whether, when the mark is seen on the

² Thus, we are not persuaded by applicant's argument that because the term "biostatic" may be susceptible to additional meanings which are not related to antimicrobial properties in general or to applicant's mattress covers in particular, the term cannot be deemed to be merely descriptive of applicant's goods. It is significant to note that while suggesting the term "biostatic" may have other meanings, applicant has failed to offer any meaning different from the one asserted by the examining attorney.

goods or services, it immediately conveys information about their nature.

In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998).

Applicant is correct in stating that the record is devoid of any dictionary definition of the term "biostatic."³ What we do have are the following excerpts retrieved from the NEXIS database showing the uses of "biostatic":

IBCI is committed to the discovery, development, marketing and sale of surface-modifying antimicrobial and biostatic products. The company's antimicrobial technology is an alternative to conventional sanitizers, disinfectants, bleaches, biocides or preservatives, primarily because it kills bacteria on contact and can remain active for extended time periods.
(*Espicom Business Intelligence*, January 14, 2003)

....and control fungi and bacteria through their biostatic properties.
(*Chemical Week*, December 4, 2002)

BioShield is a Norcross, Ga.-based company that develops, markets and sells surface-modifying antimicrobial and biostatic products.

³ The only definition submitted by the examining attorney was of the term "biostatics" retrieved from an online dictionary. Inasmuch as this Internet evidence was not submitted until the examining attorney filed the brief, we decline to consider it. *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); and TBMP §1208.04 (2d ed. rev. 1, March 2004). We would add that, in any event, the dictionary definition does not support the mere descriptiveness refusal in this case.

*(Environmental Laboratory Washington
Report, June 21, 2001)*

Under terms of the agreement,
BioShield, a producer of antimicrobial
and biostatic raw materials....
(Nonwovens Industry, August 1, 2000)

A review of applicant's website reveals that its
mattress covers are made of latex and that "[l]atex is
inherently anti-microbial and is 300% more resistant to
dust mites than traditional mattress components like cotton
batting." According to applicant, its goods offer
"significant health benefits."

Other websites of entities unrelated to applicant show
the following uses:

Benefits of copper pipe include:

Biostatic--does not support bacteria
growth
(www.builderswebservice.com)

BioShield AM500 is a stable aqueous
solution of a silicone quaternary
ammonium salt, which can produce a
durable microbiostatic coating on a
broad range of surfaces. BioShield
AM500 will provide effective protection
of treated surfaces against bacteria
and fungi, including mold and mildew.
This coating will stand up to repeated
washings in most cases, maintaining its
biostatic protection.
(www.bioshield.com)

Upon review of the record, we conclude that the mark
BIOSTATIC, if applied to mattress covers, would be merely

descriptive of such goods having antimicrobial or biostatic properties. Although not yet a dictionary term, "biostatic," as shown by the NEXIS and Internet evidence, appears to be virtually synonymous with "antimicrobial." This evidence indicates that "biostatic" is commonly used, and is understood to mean that the product is resistant to bacteria, fungi, microbes and the like. The mark BIOSTATIC immediately describes, without conjecture or speculation, a significant characteristic of applicant's goods, namely that the mattress covers are resistant to microbes. Nothing requires the exercise of imagination, mental processing or gathering of further information in order for prospective purchasers of applicant's mattress covers to readily perceive the mere descriptiveness of the term BIOSTATIC as it pertains to applicant's goods.

Decision: The refusal to register is affirmed.